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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JACKSONVILLE BULK TERMINALS, INC.,
HOOKER CHEMICAL CORPORATION, and
OCCIDENTAL PETROLEUM CORPORATION,
Petitioners,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

I. THE PROTECTIONS OF THE NORRIS-LAGUARDIA ACT SHOULD NOT BE EXTENDED TO INSULATE UNION CONDUCT MOTIVATED BY CONCERNS UNRELATED TO THE UNDERLYING POLICIES OF THAT STATUTE

Both Respondents and the Solicitor General as *amicus curiae* challenge Petitioners' position that this case does not involve a labor dispute within the meaning of the Norris-LaGuardia Act. In so doing, they studiously ignore the background and history of the Act. As demonstrated in Petitioners' principal brief (Pet. Br. 10-16),

the underlying aim of Norris-LaGuardia was to allow labor organizations to pursue the legitimate objectives of obtaining better wages and working conditions. Thus, the Court emphasized in *Marine Cooks v. Panama Steamship Co.*, 362 U.S. 365 (1960):

> The underlying aim of the Norris-LaGuardia Act was to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive judicial construction.
>
> This congressional purpose, as is well known, was prompted by a desire *to protect the rights of laboring men to organize and bargain collectively* and to withdraw federal courts from a type of controversy for which many believed they were ill-suited and from participation in which, it was feared, judicial prestige might suffer.

362 U.S. at 370 n.7 (citations omitted) (emphasis added). But where a union's conduct is unrelated to legitimate trade union objectives, the protections of the Norris-LaGuardia Act do not apply. *Compare Bakery Drivers* v. *Wagshal*, 333 U.S. 437 (1948) *with Marine Cooks.*

That the Act was designed only to protect workers in their efforts to organize and bargain collectively, is evidenced by those cases in which the Court has intepreted Norris-LaGuardia in conjunction with national antitrust policy. In deciding that the Norris-LaGuardia Act does not protect labor unions when they combine with employers in an effort to restrain trade, the Court has concluded that Congress intended in Norris-LaGuardia to remove from potential antitrust liability only certain "*specifically enumerated* practices of labor unions." *United States v. Hutcheson*, 312 U.S. 219,

230 (1941) (emphasis added). *Accord, H.A. Artists & Associates v. Actor's Equity Association*, 101 S.Ct. 2102, 2108 (1981); *Allen Bradley Co. v. Local 3, IBEW*, 325 U.S. 797 (1945). As the First Circuit said in its discussion of the application of the antitrust laws to the ILA's boycott:

> [T]he principle that emerges from the above cases is that activities are in the self-interest of a labor organization 'if they bear a reasonable relationship to a legitimate union interest. . . .' In particular, the labor exemption has been applied when the union acts to protect the wages, hours of employment, or other working conditions of its member-employees, objectives that are at the heart of national labor policy. We think the district court was correct in concluding that the ILA's 'political dispute' with the Soviet Union does not relate to a 'legitimate union interest' as the term has been defined in American labor history and law.

Allied International, Inc. v. ILA, 640 F.2d 1368, 1380 (1st Cir. 1981) (citation omitted), *cert. granted*, 102 S.Ct. 90 (1981) (No. 80-1663).

In sum, the Court has long recognized that the protection afforded a labor union by Norris-LaGuardia depends on the purpose behind the union's actions. *Allen Bradley Co. v. Local 3, IBEW*, 325 U.S. 797 (1945). Unions are protected only to the extent that their conduct is directed toward obtaining better wages and working conditions.[1] Not surprisingly, Respondents cite no case in which the

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[1] It is noteworthy that Norris-LaGuardia places definite restrictions on the range of protected union activity even where the objective is within the stated policies of the Act. Thus, the Act does not restrict injunctions against "unlawful acts [that] have been threatened and will be committed unless restrained." 29 U.S.C. § 107(a). *Brotherhood of Railroad Trainmen v. Chicago River and Indiana Railroad*, 353 U.S. 30 (1957). Similarly, union conduct that is violent or fraudulent is outside the Act's protections. *See e.g., Scott v. Moore*, 640 F.2d 708, 714 (5th Cir. 1981).

protections of Norris-LaGuardia have been extended to insulate from the usual process of law union conduct designed to achieve a purely political objective.[2]

That the instant case involves a controversy far removed from the legitimate objectives protected by Norris-LaGuardia is beyond serious question; Respondents have maintained from the start that this boycott was politically motivated. Nonetheless, Respondents assert (Resp. Br. 8) that this case involves a labor dispute insofar as Petitioners and Respondents disagree as to whether the union is required to furnish labor under its collective bargaining agreement. It is obvious that this characterization ignores the reality of the boycott's political motivation. Such a position amounts to an artificial and nonsensical bifurcation of the conduct at issue. *Cf. American Radio Association v. Mobile Steamship Association*, 419 U.S. 215 (1974).

There is no independent "labor dispute" in this case that can be severed from the ILA's politically motivated boycott; there plainly would have been no work stoppage affecting Petitioners had the ILA not decided to boycott Soviet cargo. The ILA would have this Court hold that the protections of the Norris-LaGuardia Act should be extended to conduct wholly unrelated to the objectives of

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[2] The Solicitor General's contention (S.G. Br. 14-15) that *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1928), supports the extension of Norris-LaGuardia to a politically motivated work stoppage is unfounded. The dispute in that case centered around a demand by a black civic association that a grocery store hire black employees. Understandably, the Court found that demand to be a claim for better working conditions and hence a labor dispute under the Norris-LaGuardia Act. The observation made there that the Act "does not concern itself with the background or the motives of the dispute" means only that an attempt to improve terms and conditions of employment is covered by Norris-LaGuardia, regardless of its motive. *New Negro Alliance* cannot be read, as the Solicitor General and the ILA read it (Resp. Br. 9), as holding that the motive for the ILA boycott is irrelevant.

the Act, so long as an effect of the union's conduct is disruption of an employer-employee relationship. The Court refused to condone such a result in *Allen Bradley*, and there is no reason to do so here. The anomalous result of such a position would be to make the determination of Norris-LaGuardia protection depend upon the success of the disruption rather than the objective of the conduct.

The ILA's argument is also fundamentally inconsistent with other arguments it makes in this case. As discussed below, Respondents adamantly insist that, assuming a labor dispute is found to exist here, injunctive relief under *Boys Markets Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970), was improper because the union's "underlying" dispute was with the Soviet Union. While Respondents assert in *that* argument that the "secondary" dispute over the contractual no-strike clause does not permit a pre-arbitration injunction, they blithely rely on that same "secondary" dispute to support their claim in *this* argument that they were engaged in a labor dispute within the meaning of Norris-LaGuardia.[3] The Solicitor General contributes to this confusion by suggesting (S.G. Br. 22) that there are "several underlying" disputes in this case. These inconsistencies are the inevitable result of the ILA's procrustean attempt to fit its conduct within the protection of the Norris-LaGuardia Act.[4]

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[3] Respondent's disingenuousness extends to its theories in *ILA v. Allied International, Inc.*, No. 80-1663 (*cert. granted*, October 5, 1981). In that case, the ILA stoutly insists that its "sole" dispute is with the Soviet Union (Pet. Br. 17), so that there can be no labor dispute within the meaning of Section 8(b)(4) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 158(b)(4).

[4] As established below, the ILA's conduct is properly enjoinable under *Boys Markets* in the event that the Court does determine that a labor dispute exists in this case. This is true because the conduct in which the ILA engaged was intended to restrain Peti-

There are three substantial public policy interests against extending the protections of the Norris-LaGuardia Act to the work stoppage at issue here. As already established (Pet. Br. 19-21), national labor policy recognizes that purely political conduct is not protected by federal labor law. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 570 n.20 (1978).[5] National labor policy protects concerted activity only to the extent that it advances the goal of "mutual aid and protection."[6] Certainly that limitation should be recognized in a case like this, where a union engages in economic action in support of a political objective, particularly one beyond the employer's control. As one com-

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tioners' trade with the Soviet Union, thus presenting an arbitrable dispute over the scope of the contract's management rights clause.

The ILA's conduct in *Allied International* involves similar coercion against neutral parties with an object of forcing those neutrals to cease doing business with companies such as Petitioners (Br. *amicus curiae* of Occidental Chemical 5-6, *ILA v. Allied International, Inc.*, No. 80-1663). In that case, as here, the critical factor is the method by which the ILA chose to express its political views. In both cases, the ILA's conduct was directed at specific companies because of their trading relationships with a foreign government. Federal labor law should not protect such conduct in either case.

[5] *Accord, Kelly v. United States Postal Service*, 492 F. Supp. 121, 126 (S.D. Ohio 1980) (employee wearing "death to the Shah" slogan on tee-shirt engaged in "purely political" conduct not protected by Section 7 of the LMRA). *See also Soft Drink Workers Local 812, IBT v. NLRB*, 105 L.R.R.M. 2658, 2662 n.11 (D.C. Cir. 1980). The Solicitor General would hold *Eastex* and the other authorities cited in Petitioners' principal brief irrelevant because, in his view, a purely political *Eastex* case still involves a labor dispute (S.G. Br. at 15, n.11). But that is questionable speculation in light of the similarity in the definition of the term "labor dispute" found in both the LMRA and Norris-LaGuardia. *Eastex*, 437 U.S. at 565, n.14. Moreover, that view misses the very point of *Eastex*. That the ILA's boycott would not enjoy Section 7 protection under *Eastex* renders that conduct, by definition, outside the concerns of both the LMRA and Norris-LaGuardia. As a result, the restrictions of the Norris-LaGuardia Act should not interfere with the usual process of law in such a case.

[6] 29 U.S.C. § 157. *Accord*, 29 U.S.C. § 102.

mentator has cogently observed, where the employer "is not a party to the controversy . . . there is no reason why he should be forced to permit his business to be used as a battleground." Getman, *The Protection of Economic Pressure by Section 7 of the National Labor Relations Act*, 115 U. PA. L. REV. 1195, 1221 (1967).

Second, in addition to limiting the scope of protected concerted activity to the objectives of better wages and working conditions, national labor policy recognizes the desirability of promoting collective bargaining ending with agreements not to strike. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 453 (1957). "The assurance of swift and effective judicial relief provides incentive to eschew economic weapons in favor of binding grievance procedures and no-strike clauses." *William E. Arnold Co. v. Carpenters*, 417 U.S. 12, 18 (1974). This Court has never placed a restriction on the subject matter of disputes arising under contracts covered by Section 301 of the LMRA, 29 U.S.C. § 185. *See, e.g., Retail Clerks v. Lion Dry Goods*, 369 U.S. 17 (1962). The Court's recent decision in *United Association of Journeymen Plumbers v. Local 334*, 101 S.Ct. 2546 (1981) leaves no doubt that Section 301 covers *any* dispute arising out of a collective bargaining agreement.

Accordingly, the suggestion that Section 301 jurisdiction can be no broader than the restrictions of Norris-LaGuardia is groundless. Respondents misread *dictum* in *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397 (1976), to support this assertion (ILA Br. 11-12). The language quoted therein is taken from a discussion of whether Section 301 would permit injunctive relief in a case where there was no question that Norris-LaGuardia applied. That, of course, is the very question in this case, and *Buffalo Forge* does not support the view that Section 301 jurisdiction should be denied in cases not involving a labor dispute.

To the contrary, the issue of specific enforcement of a collective bargaining agreement provides further reason for not extending the protections of the Norris-LaGuardia Act to this case. Norris-LaGuardia certainly was not intended to legitimize union conduct in blatant defiance of a no-strike pledge; conversely, the effective enforcement of contractual commitments was not one of the abuses sought to be remedied by the Act. In enacting Norris-LaGuardia, Congress did not intend to give unions the right to ignore contractual commitments with impunity. *Cf. Complete Auto Transit, Inc. v. Reis*, 101 S.Ct. 1836, 1850-51 (Burger, C.J., dissenting).

The ILA's discussion of the legislative history of the LMRA adds nothing to its position. Congress assiduously avoided using the term "labor dispute" in Section 301 of the LMRA, as well as in Section 502(2) in which it defined a "strike."[7] Indeed, Congress expressly differentiated the term "labor dispute" from the term "strike" by reasserting in Section 502(3) of the LMRA the narrow definition of the term "labor dispute" that was used in the Wagner Act. *See* 29 U.S.C. § 142(3). Congress defined the prohibitions of Section 8(b)(4) without reference to labor disputes. *See* 29 U.S.C. § 158(b)(4). The ability of the President to intervene in strikes under the LMRA's national emergency provision is similarly unrestricted. *See* 29 U.S.C. § 206. Had Congress intended to limit the application of Section 301 to labor disputes, it easily could have done so.[8] Indeed, the ILA's

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[7] That provision states:

> The term 'strike' includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slowdown or other concerted interruption of operations by employees.

29 U.S.C. § 142(2)

[8] Respondents' reliance on *American Communications Association v. Douds*, 339 U.S. 382 (1950) is curious. The Court there

argument would result in a dangerous contraction of the scope of Section 301 contrary to national labor policy.[9]

Thus, there is no merit in the contention that the collective bargaining relationship between the parties implies that this case involves a "labor dispute" for purposes of Norris-LaGuardia.[10] Indeed, this argument completely misses the point of the Norris-LaGuardia Act.

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upheld the constitutionality of Section 9(h) of the LMRA, which denied certain benefits otherwise available under the LRMA to unions which had not filed "non-Communist" affidavits. The Court observed that one of the reasons Section 9(h) was enacted was because of evidence that political groups had infiltrated union organizations "not to support and further trade union objectives, . . . but to make them a device by which commerce and industry might be disrupted when the dictates of political policy required such action." 339 U.S. at 389. Respondents' suggestion that Section 9(h) concerned only infiltration of the labor movement by Communists cannot withstand the Court's observation that "political strikes [are] the substantive evil at which Section 9(h) is aimed." 339 U.S. at 396. Section 9(h) thus is further evidence that, from the perspective of national labor policy, union economic power is legitimately exercised only when it is used to obtain better wages and working conditions. *See also, United States v. Brown*, 381 U.S. 437 (1965).

[9] The Solicitor General suggests without elaboration that consistent application of federal labor law requires the "appropriate interpretation" be given to the Norris-LaGuardia Act's definition of labor dispute. (S.G. Br. 2-3). The source of his concern is not readily apparent. Section 203(d) of the LMRA, 29 U.S.C. § 173(d), on which he relies, refers to the function of the Federal Mediation and Conciliation Service. Petitioners see no reason why that agency should become involved in a purely political work stoppage, and discern no serious harm to federal labor policy if it could not do so.

[10] The ILA's suggestion (ILA Br. 10) that there would have been no lawsuit here if the parties' collective bargaining agreement did not contain a no-strike clause does not make this case like *Buffalo Forge*. The same is true of every § 301 action brought to enforce a no-strike clause. But that fact suggests neither that Norris-LaGuardia applies here nor that injunctive relief is unwarranted.

The purpose of that Act is to prohibit federal court injunctions against certain specific forms of union conduct. If the union engages in *other* conduct, the protections of the Act simply do not apply. The applicability of Norris-LaGuardia in particular cases thus depends not on the legal theory advanced by the plaintiff or the existence of a collective bargaining relationship, but, rather, on the motivation of the union's conduct.

A third public policy consideration relevant here is the ILA's interference with the government's conduct of foreign policy. The ILA's recent announcement of a boycott of Polish cargo [11] is only the latest in a long series of such actions undertaken by Respondents without regard to the position of the Department of State. Comment, *Protest Boycotts and Federal Labor Laws: The Russian Trade Boycott Litigation*, 3 NW. J. INTL. L. & BUS. 211, 248 (1981). Petitioners agree (Pet. Br. 23-25) with the Solicitor General (S.G. Br. 1-2) that foreign policy should not be made on the docks. The protections of the Norris-LaGuardia Act should not be extended in this case to permit such a result. Because this case thus does not involve a tension between two competing aspects of national labor policy, *cf. Barrentine v. Arkansas-Best Freight Systems*, 101 S.Ct. 1437 (1981), there is no reason not to permit swift and effective enforcement of Petitioners' collective bargaining agreement in furtherance of the policies of Section 301. *William E. Arnold Co. v. Carpenters*, 417 U.S. 12 (1974).

II. INJUNCTIVE RELIEF IN THIS CASE IS NOT PRECLUDED BY *BUFFALO FORGE*

Respondents disagree with both Petitioners and the Solicitor General in arguing that injunctive relief in this case is unwarranted, assuming the applicability of the Norris-LaGuardia Act. Several points here warrant reply.

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[11] Wall St. J., Dec. 22, 1981 at 14, Col. 3.

The ILA contends that *Buffalo Forge* precludes injunctive relief because the underlying dispute is not arbitrable. Indeed, Respondents contend that this dispute "is even further removed from the arbitration clause" than was the work stoppage in *Buffalo Forge* (Resp. Br. 18). What its argument ignores is that the ILA's objective in this work stoppage makes *Buffalo Forge* readily distinguishable. The strike in this case, unlike that in *Buffalo Forge*, resulted from an affirmative act of the employer, namely, Petitioners' decision to continue trading in Soviet goods thereby requiring ILA employees to handle that cargo. The decision directly affected the employer-employee relationship and thus implicated the parties' collective bargaining agreement. In *Buffalo Forge*, on the other hand, the striking employees honored the picket line solely out of sympathy for the picketers, and not as a result of any action taken by the employer directed at the sympathy strikers.

That this case involves an affirmative act of the employer implicating the parties' collective bargaining agreement shows why the ILA's work stoppage in this case is an arbitrable dispute within the meaning of *Boys Markets*, while the dispute in *Buffalo Forge* was not. Because it results in ILA members refusing to handle Soviet cargo, Respondents' disapproval of Petitioners' decision to trade with the Soviets implicates the management rights provision of the contract.[12] Unlike *Buffalo Forge*, this work stoppage and the dispute underlying it are confined to the employment relation-

[12] The Solicitor General also argues that the case raises an issue under the "burdensome conditions" clause of the contract, in that the ILA objected to work assignments to handle Soviet cargo (S.G. Br. 20-26). The right to assign work is derived from the management rights clause, similar to the right of the employer to choose its customers. As a result, the Solicitor General's position is subsumed in that of Petitioners; the "burdensome conditions" clause merely provides an express remedy for disputes over certain exercises of managerial prerogative.

ship covered by the parties' collective bargaining agreement. As in *Boys Markets*, the work stoppage in this case involved a disagreement over the effect and interpretation of a specific provision in the parties' collective bargaining agreement, other than the contract's no-strike clause. Indeed, the work stoppage here is like any other case in which employees challenge the conditions under which they will perform work. Certainly these kinds of disputes are "grist in the mill of the arbitrators." *United Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 584 (1960). *See also, Barrentine v. Arkansas-Best Freight Systems*, 101 S.Ct. at 1450 (Burger, C.J., dissenting).[13]

This distinction thus vitiates Respondents' arguments against the propriety of *Boys Markets* relief in this case. The ILA's argument (Resp. Br. 21) that this case does not involve a dispute over management rights is absurd. The ILA denied its labor to Petitioners, and not as it asserts, to the Soviets. Furthermore, Respondents most emphatically *did* tell their employers they could not do business with Russia, at least so far as longshore work was necessary to that business. That the boycott did not extend to non-Soviet goods makes it no less an attempt to dictate Petitioners' choice of customers. That

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[13] Thus, arbitrators routinely determine the propriety of managerial decisions affecting assignment of work. *See, e.g., Aerojet Ordnance & Manufacturing Co.*, 61 Lab. Arb. (BNA) 581 (Rule, 1973) (company properly assigned particular operation to employees classified as assemblers rather than to inspectors); *Lear Siegler, Inc.*, 63 Lab. Arb. (BNA) 208 (Herman, 1974) (an employer properly assigned testing of parts to employees classified as testers rather than to employees holding higher classified job of electronic analyzer). Where an employee refuses a work assignment, he is subject to discipline:

> It is longstanding industrial relations practice that with respect to management orders, employees must 'Obey now and grieve later', where they feel that management is violating the agreement.

Waterloo Industries, 62 Lab. Arb. (BNA) 605, 609 (Gilroy, 1974).

the ILA did absolutely nothing to further its boycott other than refuse to handle Soviet cargo demonstrates that Petitioners were intended to be, and in fact became, the focus of the boycott, notwithstanding its political genesis.

Other arguments suggesting that *Buffalo Forge* governs this case are equally without merit. Unlike the arbitration provision in *Buffalo Forge*, the arbitration provision in this case is not restricted to disputes over the meaning of specific provisions in the collective bargaining agreement; indeed, it broadly provides for arbitration of all "matters in dispute" (J.A. 62). It would be nonsense to suggest that the ILA's work stoppage was not a matter in dispute between Petitioners and Respondents. It is similarly illogical to say that the dispute is not arbitrable because no arbitrator could resolve the underlying dispute. That argument begs the very arbitrable issue question posed in this case—whether the employer was within its rights as defined by the management rights provision in continuing to deal with the Soviet Union. That question, of course, is to be decided by an arbitrator and not, as did the Fifth Circuit below, by a court.[14]

Respondents contend that this work stoppage is not arbitrable because the arbitrator could only decide whether or not the strike violated the contract (Resp. Br. 24). This argument is premised on the erroneous belief, shared by *amicus curiae* American Federation of Labor and Congress of Industrial Organization ("AFL-CIO"), that a *Boys Market* injunction cannot issue unless the strike is "in response to an alleged employer contract violation" (AFL-CIO Br. 8). Such a claim has no bearing in this case for the reasons set forth above. That argument,

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[14] The parties' no-strike clause is broadly worded, and thus is not tied to the arbitration provision. Accordingly, there is no reason here to apply the principle of coterminous application of the two provisions. *See Pacemaker Yacht Co., Div. v. NLRB*, 108 L.R.R.M. 2817 (3d Cir. 1981).

moreover, is directly foreclosed by the Court's decision in *Gateway Coal v. United Mine Workers*, 414 U.S. 368 (1974). The work stoppage at issue there was prompted by the company's reinstatement of two supervisory employees who had previously been suspended following improper behavior in connection with a safety dispute. This Court had no difficulty finding the work stoppage to be within the scope of the parties' contractual arbitration provision which, like the one in this case, was broadly worded:

> This arbitration provision appears sufficiently broad to encompass the instant dispute. The contractual obligation reaches "any local trouble of any kind aris[ing] at the mine," and the continued presence in Gateway Mine of two particular foremen is plainly a local issue. On its face, this contractual language admits of only one interpretation: that the agreement required the union to submit this dispute to arbitration for resolution by an impartial umpire.

414 U.S. at 376. *Gateway Coal* arose not from a dispute over a "presently existing threat to the employees' safety, but rather a generalized doubt in the competence and integrity of company supervisors." 414 U.S. at 386. Similarly, *Gateway Coal* did not arise from a specifically alleged employer contractual violation. It was never argued in that case that the company violated the contract by reinstating the supervisors; the claim was seen rather as a safety dispute. Like this case, *Gateway Coal* involved a disagreement and resulting work stoppage over the exercise of managerial prerogative; *i.e.*, over the company's decision there to reinstate the two supervisors. Yet no one argued in *Gateway Coal* that *Boys Markets* relief was unwarranted because the underlying dispute was not grounded in a particular alleged contract violation. Nor can *Buffalo Forge* be fairly read as requiring one.

The error of Respondents' position is best seen in their assertion (Resp. Br. 18) that this case, just like

Buffalo Forge, involves a sympathy strike. Nothing could be further from the truth. A union engaging in a sympathy strike has an economic motivation directed at legitimate union objectives. Indeed, honoring a picket line is one of the specific activities sought to be protected by Norris-LaGuardia. Sympathy strikes are thus anything but "altruistic;" the strike in *Buffalo Forge* was designed to place additional economic pressure on the employer in support of the demands of its other employees. Here, on the other hand, the ILA's conduct may well have been altruistic, albeit inconsistent with foreign policy. That the ILA's boycott was not motivated by legitimate trade union concerns is the decisive fact in this case, as it reveals that the ILA did not seek any objective protected by federal labor law. Because there is no statutory tension here between two conflicting aspects of national labor policy, *see Barrentine v. Arkansas-Best Motor Freight Systems*, 101 S.Ct. 1437 (1981), effective enforcement of the no-strike clause in furtherance of the policy behind Section 301 is required.

It is hornbook law that there is a "strong congressional policy favoring grievance procedures and arbitration as a method of resolving labor disputes . . . . This mechanism promotes industrial harmony and avoids strikes and conflicts; it provides a swift, fair, and inexpensive remedy." *Barrentine v. Arkansas-Best Freight Systems*, 101 S. Ct. at 1448 (Burger, C.J., dissenting). *Accord, Clayton v. UAW*, 101 S.Ct. 2088 (1981). By refusing to give due deference to the presumption of arbitrability and by improperly deciding the merits of the underlying arbitrable dispute, the Fifth Circuit's decision below improperly ignores this policy.

III. *BUFFALO FORGE* SHOULD BE CLARIFIED TO PRECLUDE ITS APPLICATION TO CASES INVOLVING UNION OBJECTIVES THAT ARE BEYOND THE CONTROL OF THE EMPLOYER

As set forth in our principal brief and herein, the Court need not overrule *Buffalo Forge*. The lower court's decision in this case, however, argues strongly for reconsideration and clarification of the Court's intention in that case.

Neither Respondent nor the AFL-CIO seriously dispute Petitioners' observation that, in the absence of a pre-arbitration injunction, an employer is left without an effective remedy against a work stoppage of this nature. Respondents say merely that the lack of an effective remedy is irrelevant (Resp. Br. 32, n.30), and thereby reveal a callous disregard for effectuation of the national labor policy goal of peaceful resolution of labor disputes. Regarding the uncertain availability of a damages remedy in a work stoppage like this (*see* Pet. Br. 32-33), the AFL-CIO merely observes that some cases have resulted in large damage awards against local unions. That fact hardly proves that the pursuit of damages is as effective a remedy as an injunction. More important, the AFL-CIO completely ignores the critical point that acrimonious litigation over damages further exacerbates industrial strife and undermines the goals of national labor policy. With respect to the possibility of disciplining employees engaged in illegal work stoppages, the AFL-CIO seemingly concedes the propriety of such action, neglecting both the recent law questioning the availability of that remedy (Pet. Br. 39-40 n.19), and the fact that wholesale discipline does nothing to ease industrial strife. Indeed, such action by an employer may amount to economic suicide. *Cf. Complete Auto Transit, Inc. v. Reis*, 101 S.Ct. at 1851 (Burger, C.J., dissenting). In a situation like this, where employees are obtained through a union's hiring hall, moreover, that action would be altogether ineffective.

The "lawless vacuum" resulting from the lack of effective remedies against work stoppages in breach of contract is particularly harsh in cases such as this, where, if Respondents' argument is accepted, the employer can do absolutely nothing to resolve the dispute causing the work stoppage.[15] Certainly where the employer has bargained for a broad no-strike provision, it plainly should not bear the responsibility when the union's goals bear no relationship to the protections provided by the federal labor laws. *Complete Auto Transit, Inc. v. Reis*, 101 S.Ct. at 1851 (Burger, C.J., dissenting).[16]

The unintended and unfortunate results of *Buffalo Forge* thus become evident in this case. The Court's reliance on the theory of coterminous application of contractual no-strike and arbitration provisions has caused considerable difficulty in the lower courts (Pet. Br. 34-35).[17] A mechanical application of that theory has yielded results inconsistent with federal labor policy. As the Third Circuit recently observed:

> Moreover, to require specific enumeration in a no-strike clause of all possible nonarbitrable disputes that might result in a work stoppage would place an unjustified obstacle on the ability of employers to

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[15] Under Petitioners' approach to this case, on the other hand, the employer does have the power to resolve the cause of the work stoppage because it is directed at its decision to continue trading with the Soviet Union, *see* pp. 10-15 *supra*, thereby making this strike enjoinable under *Boys Markets*.

[16] One commentator has argued that the impact of the Court's decision in *Complete Auto Transit* is contrary to the goal of peaceful resolution of labor disputes because of the absence of remedies available to an employer faced with an illegal work stoppage, and that the Court's decision there "increases the odds on serious reconsideration of *Buffalo Forge*." Gould, *Address before the American Bar Association Section on Labor Law 1981 Convention, reported in* [1981] Daily Lab. Rep. (BNA) D-1, D-5 (Aug. 11, 1981.)

[17] *See also* Gould, *Recent Developments Under the National Labor Relations Act: The Board and the Circuit Courts*, 32 LAB. L. J. 424, 444 (1981).

> bargain for an across-the-board no-strike clause and on the employees' ability to gain concessions in return for such a pledge. An employer who bargains for such a clause would never be certain that employees would not strike over some unforeseeable dispute, and employees, in turn, would have less to offer during contract negotiations. No federal labor policy supports such a restriction on party autonomy in the collective bargaining process.

Pacemaker Yacht Co., Div. v. NLRB, 108 L.R.R.M. 2817, 2830 (3d Cir. 1981).

Of equal concern is the view articulated by the *Buffalo Forge* Court concerning the use of the labor injunction in fostering the national labor policy of resolving disputes through arbitration rather than through strikes and boycotts. There is no principled reason, consistent with the ban of Norris-LaGuardia, for permitting an injunction to enforce an arbitrator's award while denying the same relief while the parties pursue the arbitration process. In both situations, federal courts are forced to enjoin work stoppages. To say that the pre-arbitration injunction usurps the arbitrator's function is unrealistic. *Buffalo Forge*, 428 U.S. at 428 (Stevens, J., dissenting). Federal courts routinely interpret the collective bargaining agreement in every *Boys Markets* case, as well as in other areas of federal labor law. *See, e.g., Local 189, Meat Cutters v. Jewel Tea Co., Inc.*, 381 U.S. 676, 686 (1965) ("Federal courts are not without experience in interpreting collective bargaining agreements and classifying bargaining subjects as terms or conditions of employment") (White, J.). The courts' initial interpretation in such cases is fully consistent with the teachings of the *Steelworkers Trilogy*[18] and does not usurp the arbitrator's function. In every *Boys Markets* case the courts make two initial determinations: whether the work stoppage does, in fact, violate an express or implied no-strike

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[18] *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

clause,[19] and whether there is a colorable claim that the dispute is over an arbitrable grievance. Indeed, it was the Fifth Circuit below which improperly usurped the arbitrator by deciding the arbitrable dispute on the merits.

It is further submitted that the requirement of an underlying arbitrable dispute before a pre-arbitration injunction can issue is inconsistent with national labor policy, when applied in a case such as this. The ILA's work stoppage is a naked breach of contract which, according to the Fifth Circuit, cannot be enjoined. A work stoppage motivated by a claim that the employer had violated the contract would be far more defensible, but, ironically, that work stoppage would be enjoinable. Such a result encourages lawlessness and strife (Pet. Br. 32-33), and does nothing to induce employers to agree to broad no-strike provisions. *Complete Auto Transit, Inc. v. Reis*, 101 S.Ct. at 1851 (Burger, C.J., dissenting). Permitting such a strike without effective redress plainly deprives the employer of its expectation of continued uninterrupted production during the life of the contract.[20]

As set forth in our principal brief and herein, the Court need not reach the question of the applicability of *Buffalo Forge*. If it does so, Petitioners submit that *Buffalo Forge* should be clarified so as to permit pre-

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[19] This is particularly common in cases where no-strike clauses reserve the right to strike in certain situations. *See, e.g., Associated General Contractors of Illinois v. Illinois Conference of Teamsters*, 454 F.2d 1324 (7th Cir. 1972) (Stevens, J.); *Matson Plastering Co. v. Plasterers Local 295*, 633 F.2d 1306 (9th Cir. 1980). This is a common occurrence; roughly half of all no-strike provisions contain some restriction on the no-strike pledge. Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663, 758 (1973).

[20] The AFL-CIO's concern (AFL-CIO Br. 10-17) with *stare decisis* is the best evidence that it has also been confused by *Buffalo Forge*. Subsequent interpretation of that decision has made it clear that it disserves the interests of national labor policy and, accordingly, that it should be reconsidered.

arbitration injunctive relief in a case like this, where there is clear evidence that the work stoppage violates the collective bargaining agreement, and where all the other conditions set forth in *Boys Markets* are satisfied. This clarification would extend only to situations in which the objective of the union's work stoppage is beyond the control of the employer. *Cf., NLRB v. Pipefitters Local 638*, 429 U.S. 507 (1977). Such a result would not only encourage arbitration and the peaceful resolution of labor disputes, but would also remove the anomaly of an employer being unable to obtain effective relief against a work stoppage which it had nothing whatsoever to do with and which it is powerless to resolve. Such a result, as argued in our principal brief, would further national labor policy by removing much of the confusion caused by *Buffalo Forge* in the lower courts, particularly if the Court emphasizes that the theory of coterminous application of no-strike and arbitration provisions is not part of the rationale in *Buffalo Forge*. By acknowledging that a clear breach of the no-strike provision creates an arbitrable dispute within the meaning of *Boys Markets*, the Court will further the interests of peaceful resolution of labor disputes.

CONCLUSION

Petitioners respectfully pray that this Court reverse the decision of the court of appeals.

Respectfully Submitted,

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